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No. 535

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE PIANO AND MUSICAL INSTRUMENT WORKERS UNION, LOCAL NO. 2549 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

v.

W. W. KIMBALL COMPANY, a Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated October 23, 1964

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BRIEF FOR RESPONDENT IN OPPOSITION

THE HEART OF THE CASE

This suit was brought by petitioner ("Union") to compel respondent ("Kimball") to submit to arbitration an alleged dispute arising from Kimball's alleged refusal to hire its former Melrose Park, Illinois employees at its new plant near French Lick, Indiana.

The Court of Appeals found that no difference arose between Kimball and the Union during the term of the agreement and held that Kimball could not be compelled to arbitrate.

The Union seeks to have reviewed the fact inferences which the Court of Appeals drew from the record. The sole basis for the Union's petition is an alleged conflict between the opinion of the Court of Appeals and the decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

Kimball contends that the Court of Appeals' decision does not conflict with Wiley and that the matter which the Union seeks to have reviewed is a factual one for which a writ of certiorari should not issue.

QUESTION PRESENTED

The question is whether the opinion of the Court of Appeals conflicts with the rule of the Wiley case.

FACTS

For almost three years prior to August, 1961 Kimball had been attempting to curtail its financial losses by closing various departments at the Melrose Park plant and transferring their operations to plants in other states. Mounting losses forced it to close the Melrose Park plant and construct another at French Lick, Indiana, near its parent company's headquarters. (App. 92-97)* All manufacturing operations at the Melrose Park plant ceased on August 17, 1961 and Kimball did not again engage in such operations until after hiring commenced on October 9, 1961 at its new plant in French Lick, Indiana. (App. 83, 86; SA 11**)

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* For the convenience of the Court, the references to Kimball's Appendix, as filed with the Court of Appeals, will be designated as "App. ....".

** Supplemental Appendices attached to Union's Petition for Writ of Certiorari.

The collective agreement between Kimball and the Union terminated at midnight, September 30, 1961. (App. 26, 41-42, 82, 87, 98; SA 11)

Kimball and the Union met on September 7, 1961 to discuss the Union's demands for an extension of the agreement and the Union stated that it had a list of 39 Melrose Park employees who wanted to work at the new French Lick plant. (App. 82, 98; SA 12) At that meeting and at subsequent meetings Kimball made requests for the list but the Union refused to provide it. (App. 77, 82, 83, 98; SA 12, 13, 16-17, 18) The Union demanded that Kimball send recall notices to all former Melrose Park employees. (App. 84, 99; SA 13) This would have called for a useless act which Kimball declined to perform for the following reasons:

1. That there would not have been any jobs for a number of the employees at French Lick because, in order to update production procedures to make them economically efficient, quite a few of the operations which had taken place at the Melrose Park plant had to be discontinued or materially altered so that job classifications were not the same at French Lick. (App. 93-97; SA 17)

2. That, since the Union had such frequent contact and close rapport with the employees—and particularly since it knew the names of the 39 persons who might possibly be willing to accept jobs at French Lick—Kimball urged the Union to distribute to *all* of the Melrose Park employees job application forms to be supplied by Kimball (a request which the Union also rejected). (App. 83-84, 98-99; SA 13)

No Melrose Park employee has ever applied for work at the French Lick plant. (App. 99; SA 17) Kimball has never denied or even questioned the seniority rights of the Melrose Park employees. (App. 86, 99; SA 17) No dispute has ever existed between Kimball and the Union regarding seniority rights or regarding the hiring of employees at the French Lick plant. (App. 86, 99; SA 19)

The Union brought several charges before the National Labor Relations Board but the Board found no evidence to support the Union's charges and refused to issue a complaint against Kimball. (App. 74-78, 84) On appeal the Board's decision was affirmed by the General Counsel of the Board. (App. 79-80, 84-85)

The District Court ordered Kimball to submit to arbitration on the ground that the question of whether an arbitrable dispute exists should itself be resolved by an arbitrator. The District Court in dictum stated that an arbitrable dispute existed between Kimball and the Union. (App. 47-58) The Court of Appeals reversed the District Court and ordered that the Union's complaint be dismissed. The Court of Appeals held that the question of arbitrability should be determined by a court and that no arbitrable dispute existed between Kimball and the Union.

ARGUMENT

The Decision of the Court of Appeals is Not Unique

The Union contends that this decision of the Court of Appeals is unique and sets the Seventh Circuit apart as "an island unto itself". (Petition p. 9, 13) Such is not the case.

In Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (CA 2, 1962), cert. denied 374 U.S. 830, cited by the Court of Appeals in its opinion, it was held that disputes arising *after* the termination of a collective agreement are not subject to arbitration under the standard arbitration clause such as that found in the instant case. The Court said:

> "Grievances which are based upon conditions arising *during the term of the agreement to arbitrate* are arbitrable after that term has ended. . . . This principle has no application to grievances which arise *after the expiration* of the agreement to arbitrate.
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> • • •
>
> "We hold, then, that no right of employees to arbitrate survived the expiration of the collective agreement." (312 F.2d 181, 186)

The same rule was followed in Local Union No. 998 v. B. & T. Metals Co., 315 F.2d 432 (CA 6, 1963).

Moreover, this doctrine was tacitly approved by this Court in Wiley, the very case which the Union argues is in conflict with the judgment rendered by the Court of Appeals. In the opinion of the Second Circuit in the Wiley case, unanimously affirmed by this Court, the Second Circuit took pains in the following language to approve the precise doctrine enunciated in Procter & Gamble:

> "As this action was commenced prior to January 31, 1962, the termination date of the agreement, our decision is entirely consistent with Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 2 Cir., 312 F.2d 181, where we held that grievances arising after the expiration of a collective bargaining agreement are not arbitrable." (Livingston v. Wiley, 313 F.2d 52, 56 (CA 2, 1963))

Thus, the opinion of the Court of Appeals espouses no new or novel legal doctrine but rather reaffirms a common sense rule which has been approved by every court which has had occasion to pass upon it.

There is No Conflict With the Rule of the Wiley Case

The Union contends that the decision of the Court of Appeals is in conflict with Wiley. (Petition p. 9) This is not so.

The Court of Appeals decided the central issue—whether the court or the arbitrator is to decide the question of arbitrability—in complete conformity to Wiley. This Court there stated that the question of arbitrability should be decided by the court (376 U.S. 543, 546)—and so did the Court of Appeals in the instant case. (SA 18)

On the question of whether an arbitrable dispute exists in this case, the Court of Appeals devoted the major portion of its opinion to an analysis of the Wiley decision and correctly found that Wiley did not compel a holding in favor of the Union.

The Dispute in Wiley

An examination of the two cases at once establishes the correctness of the Court of Appeals' conclusion. In Wiley

the issue was whether the Union had the right to compel an employer to submit to arbitration the question of the effect of the employer's merger upon the rights created by the collective agreement. The merger, and even the filing of the litigation, occurred *during the term of the agreement.* The facts dramatically revealed a clear-cut dispute between the Union and the employer as to the effect of the merger on the contract. The Union, on the one hand, contended that its rights under the contract remained unaffected by the merger, while the employer asserted that the merger freed it from all obligations under the agreement. Thus, the existence of a dispute was undeniable. This Court held that such a dispute *arising during the term of the collective agreement* was a proper subject of arbitration.

The Absence of a Dispute in this Case

In the instant case the only dispute alleged by the Union is said to involve the contractual seniority rights of the Melrose Park employees at the French Lick, Indiana plant. The record reveals, however, that no such dispute has ever arisen. Kimball at no time refused to recognize the seniority rights of the Melrose Park employees, nor did it ever disagree with the interpretation of those rights as espoused by the Union. (App. 86, 99; SA 17, 19)

Kimball has never denied employment to any Melrose Park employee at the Indiana plant. (App. 86, 99; SA 17)

No Melrose Park employee has ever requested a transfer to the Indiana plant, nor, in the words of the Court of Appeals, "indicated to defendant the slightest desire to go." (SA 17)

If a Dispute Exists in this Case, It Did Not Occur Until After the Termination of the Agreement

The only conceivable basis which the Union could advance for its contention that a dispute existed was the fact that no former Melrose Park employees were hired when Kimball began hiring at its Indiana plant. Therefore, the Union has contended that a dispute arose from Kimball's failure to hire former Melrose Park employees.

It is uncontradicted that the hiring or failure to hire did not take place at least until October 9, 1961, at which time the collective agreement had terminated. (App. 26, 41-42, 82, 83, 86, 87, 98) Both the District Court and the Court of Appeals so found. (App. 48, 50, 52; SA 11, 13, 18) Thus, even if the case is viewed most strongly in favor of the Union and if the hiring or failure to hire could have given rise to a dispute, it was only a dispute which arose *after* the termination of the agreement.

This points up the second vital distinction between the instant case and Wiley, for in Wiley there was not only a dispute but a dispute which arose *during* the term of the agreement. This Court there said:

> "District 65, Retail, Wholesale and Department Store Union, AFL-CIO, entered into a collective bargaining agreement with Interscience Publishers, Inc., a publishing firm, for a term expiring on January 31, 1962. . . . On October 2, 1961, Interscience merged with the petitioner John Wiley & Sons, Inc., another publishing firm, and ceased to do business as a separate entity.
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> • • •
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> "In discussions before and after the merger, the Union and Interscience (later Wiley) were unable

to agree on the effect of the merger on the collective bargaining agreement and on the rights under it of those covered employees hired by Wiley.

"Wiley . . . asserted that the merger terminated the bargaining agreement for all purposes.

"No satisfactory solution having been reached, the Union, one week before the expiration date of the Interscience bargaining agreement, commenced this action to compel arbitration." (376 U.S. 543, 544-546)

There is No Conflict With the Cases Which Followed Wiley

For the same reason that the Court of Appeals' decision does not conflict with Wiley, it also does not conflict with the decisions which have applied the rule of Wiley. The Union cites Wackenhut Corporation v. International Union, United Plant Guard Workers of America, 332 F.2d 954 (CA 9, 1964), and United Steelworkers of America v. Reliance Universal Inc. of Ohio, 335 F.2d 891 (CA 3, 1964).

In both of these cases the courts were faced with the same problem resolved by this Court in Wiley. In both cases a clear-cut dispute arose *during* the term of the agreement as to the obligations of a new employer under an existing agreement signed by the union and a former employer.

In one case the new employer entered the scene through a merger and in the other through a purchase of assets. In both cases, as in Wiley, the agreements were in existence when the new employers took over. The facts of both cases rendered them indistinguishable from Wiley and therefore the courts held that the successor employers were bound by

the arbitration provisions of the agreement. The same facts make the cases inapplicable to the instant case.

The Union's Attempt to Review the Factual Findings of the Court of Appeals

The Court of Appeals found as a fact that the dispute alleged by the Union did not occcur until after the termination of the agreement and went on to hold that that dispute was not arbitrable. The factual cornerstone of the Union's case has been the existence of an alleged dispute in regard to the seniority rights of the Melrose Park employees at Kimball's new Indiana plant. On this vital issue the Court of Appeals held directly against the Union, stating:

> "We further hold that, during the term of the agreement, there was never any *difference* between the parties to this case in regard to seniority rights as to employment at French Lick, and that therefore there was no difference which became a proper subject for arbitration." (SA 19)

It is this simple fact determination and the inferences which the Court of Appeals drew from the record which the Union seeks to have reviewed. The Court of Appeals did not set forth any new or novel legal doctrine, nor did it decide "an important question of federal law" within the provisions of Rule 19 governing considerations for review on certiorari.

Moreover, the Union's attempt to obtain review of the factual inferences drawn by the Court of Appeals from the record conflicts directly with the frequently expressed rule that a writ of certiorari will not be granted for such purposes. As stated in General Pictures Co. v. Electric Co., 304 U.S. 175 (1938):

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (304 U.S. 175, 178)

CONCLUSION

The Union's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated October 23, 1964